IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-5780

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR THE PETITIONER

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On Writ Of Certiorari To The Supreme Court of Florida

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion below, a per curiam memorandum decision, is reported at 376 So. 2d 855 (Fla. 1979). It denied relief to petitioner, relying completely upon *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979), a companion case decided on the same date. Both opinions are reproduced in the appendix (A 19a-23a).

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on November 1, 1979. No petition for rehearing was filed. The petition for writ of certiorari was filed *pro se* on December 13, 1979, with accompanying motion for leave to proceed *in forma pauperis*. The petition was granted as to question one on March 17, 1980, as was the motion for leave to proceed *in forma pauperis*. On further motion of petitioner, counsel was apponted on April 28, 1980. The jurisdiction of this Court rests upon 28 U.S.C. §§ 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following federal constitutional provision is involved:

> No State shall . . . pass any . . . ex post facto law. U.S. Const. art. I, §§ 10, cl.1

Several Florida Statutes, notably Section 944.27 (1975) and Section 944.275 (1979), are involved. The pertinent portions are set forth in the Statement of the Case, *infra*, and the complete provisions are reproduced in an appendix to this brief.

QUESTION PRESENTED

Question one presented by the petition is rephrased more precisely as follows (Rule 40(2), Rules of the Supreme Court of the United States [1970 version]):[1]

> Whether a state statutory amendment reducing substantially the right to acquire gain time conditioned only upon good conduct violates the *ex post facto* prohibition of the federal Constitution as applied to a prisioner who had been convicted of an offense occurring prior to the effective date of the amendment and who had been acquiring gain time under the significantly more beneficial provisions of the former statute.

STATEMENT OF THE CASE

Procedural History

The petitioner was convicted on May 13, 1976, in a Florida state court of second degree murder allegedly occurring on January 31, 1976[2], and was sentenced to a

---

[1] The petition phrased the question in this manner:

> "Where a statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such statute to the accused ex post facto?"

[2] The date of the offense is established in the record below by resort to the date of arrest shown in the commitment order of the trial court (A 8a). This date has been verified by counsel by comparison with the original criminal information filed February 17, 1976, *State of Florida* v. *Weaver,* Case No. 76-739B, Circuit Court of Hillsborough County, Florida. The same trial court file reflects that petitioner in fact pleded guilty to the charge pursuant to plea negotiations with the prosecutor. (Judgment entered May 13, 1976 and transcript of sentencing proceedings of May 13, 1976 (filed August 12, 1977), pages 2-3, and 11.)

term of imprisonment of 15 years less credit for prior jail time (A 8a).

Under Florida statutory law as it existed on both January 31 and May 13, 1976, opportunity to acquire "gain time for good conduct" was available to petitioner Fla. Stat. §§944.27 (1975).[3] The pertinent portions of this statute (hereafter the first statute) are:

> "944.27 Gain time for good conduct; . . .
>
> (1) The division shall grant the following deductions for gain time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him, to wit:
>
> (a) Five days per month off the first and second years of his sentence;
>
> (b) Ten days per month off the third and fourth years of his sentence; and
>
> (c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month."

By enactment of Chatper 78-304, Laws of Florida, the Florida Legislature repealed Section 944.27 and

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[3] The principal Florida statutes and session laws cited are reproduced in their entirety at the end of this brief. The Florida term of "gain time" is utilized herein, but it should be noted that in many jurisdictions the term "good time" is employed. In common parlance both are known as "time off for good behavior."

enacted Section 944.275, Florida Statutes (1979), ostensibly effective July 1, 1978. This repealing act contained no savings clause. The new statute (hereafter "the second statute") in pertinient part provides:

> "944.275 Gain time; . . .
>
> (1) The department shall grant the following deductions for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties and tasks assigned, as follows:
>
> (a) Three days per month off the first and second years of the sentence;
>
> (b) Six days per month off the third and fourth years of the sentence;
>
> (c) Nine days per month off the fifth and all succeeding years of the sentence; and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month."

The second statute in the subsection pertinent to this case differs from the first in adopting a requirement that gain time be granted "on a monthly basis, as earned," and substituting a requirement that "work, duties and tasks assigned" be "performed in a satisfactory and acceptable manner" for the former requirement that such be "performed in a faithful, diligent, industrious, orderly and peaceful manner." The monthly earning provision is not material and was, in fact, added by still

another amendment intervening between May 13, 1976, and the second statute.[4] The linguistic changes relating to quality of work performed are of no consequence, because they either present no change or a change of a less onerous nature.[5]

The change now challenged lies in the dramatic reduction in the opportunity to acquire gain time for good conduct and thus procure a reduction in sentence. The impact on petitioner and those similarly situated[6] is vividly displayed in a tabular form depicting what amounts to a 40 percent reduction in opportunity to ac-

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[4] Chapter 76-273, Laws of Florida. Indeed it is dubious if this addition represents a change in the first statute in view of the final clause of Section 944.27(1)(c). However, it was probably intended to clarify the prior administrative practice of condititonally determining a tentative date of release on the assumption that all gain time would be earned. See *Harris* v. *Wainwright*, 376 So. 2d. 855 (Fla. 1979). (A 21a)

[5] See *Calder* v. *Bull*, 3 Dall. 386, 391 (1798).

[6] Although not a class action, this case has dramatic repercussions for numerous persons in the Florida penal system. In the year ending June 30, 1976, 4,695 persons were initially confined in the Florida penal system to serve sentences longer than three years (including petitioner); the corresponding numbers for the year ending June 30, 1977 (sentences more than two years) and the year ending June 30, 1978 (sentences more than one year) are respectively 6,228 and 7,732. (Annual Reports, State of Florida Department of Offender Rehabilitation, 1975-1976, 1976-1977 and 1977-1978). Thus, 18,654 other persons (unless released for other reasons) are subject to a greater or lesser degree to the same effects of the statute as is petitioner.

quire gain time (*e.g.*reduction of five days to three days is reduction of two days or 40 percent of five days):

	First Statute	Second Statute
Years 1 and 2	5 days per month	3 days per month
Years 3 and 4	10 days per month	6 days per month
Year 5 and thereafter	15 days per month	9 days per month

This change from "5-10-15" to "3-6-9" has the following consequences to prisoners serving these illustrative sentences:

Sentence	Sentence Less Gain Time for Good Conduct	
	First Statute	Second Statute
5 years (1825 days)	1285 days	1501 days
10 years (3650 days)	2210 days	2786 days
15 years (5475 days)	3135 days	4071 days

(Source: Gain Time Tables of State of Florida Department of Offender Rehabilitation, 1977 and 1979.)

For reasons not clear in the record (but as to which there could be no complaint here), the state continued to apply the first statute until December 31, 1978 (six months after the effective date of the second statute) and did not implement the decreased gain time schedule until January 1, 1979 (A 6a). It then was applied from that date forward to all persons such as petitioner who were then in confinement (A 12a). In so doing, the State Department of Offender Rehabilitation relied upon an opinion of the Attorney General of Florida reciting that, "I know of no constitutional prohibition . . . which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act." (A 10a) Asserting that the statute would operate only prospectively, the Attorney General opined that he found no feature of the statute which "imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed." (A 10a) The opinion fails to cite even one decision which involved the factual situation here involved.

It is undisputed that under the first statute the petitioner had an anticipated release date of December 31, 1984. (A 15a-17a) Utilizing the second statute to govern his case on and after January 1, 1979, under the detailed calculation submitted by the state he had a new projected release date of February 2, 1987, a difference of

two years, one month, and two days, approximately fourteen percent of his original sentence (A 13a).[7]

Petitioner and others similarly affected separately brought *pro se* habeas corpus proceedings directly in the Supreme Court of Florida, each raising the question of the constitutional propriety of the application to the petitioner of the decreased gain time schedule. On November 1, 1979, the Court filed its opinion in the case of *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979) denying relief. That opinion was cited in the memorandum opinions in remainder of the cases, including that of petitioner.[8]

Apart from inclusion within a group of citations of one *per curiam* affirmance by an equally divided court *(Hiatt* v. *Campagna*, 340 U.S. 880 (1950)), the Supreme Court of Florida did not discuss or distinguish any holdings of this Court, although a number were cited to

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[7] Although the theoretical calculation for petitioner amounts to a slightly different time, the actual anticipated release dates cited result from other features of Florida law not here involved, such as loss of gain time for disciplinary reasons and accumulation of extra gain time (a matter of administrative discretion not here involved). However, it cannot be denied that by any calculation the difference is substantial. Thus, a fourteen percent increse is in effect a requirement to serve an eight day week for credit formerly awarded for seven.

[8] *Besser* v.*Graham*, 376 So 2d 857 (Fla. 1979); *Green* v.*Wainwright*, 376 So. 2d 857 (Fla. 1979); *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979); *Weaver* v. *Graham*, 376 So. 2d 855 (Fla. 1979). At least in the case of petitioner, and apparently in the others, there was no oral argument of other hearing and none of the petitioners were represented by counsel. It should be noted that the year of the opinion date shown for *Harris* in the appendix as 1973 is an obvious error. (A 20a)

that court by petitioner (A 15a). Observing that at best "any notion of gain time can only be considered as conditionally vested," it held that "the allowing of gain time is an act of grace. . . [which] may be withdrawn, modified or denied," and that "the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose." 376 So. 2d at 856-857 (A 21a). Although not dealing with the issue of the dramatic alteration in the projected release dates, it commented in distinguishing other authorities, "[t]his is not a situation in which a new law has been passed *eliminating* the allowance of gain time in certain situations," and "[i]t is not a situation in which the length of incarceration for juvenile offenders has been extended." *Id.* at 857 (emphasis added). (A 21a) The relevance of these distinctions was not amplified. The Court surprisingly did not discuss its own holding in *Lee* v. *State*, 294 So. 2d 305 (Fla. 1974), *overruled on other grounds*, 340 So. 2d 474 (Fla. 1976), that a statute restricting parole could not be applied to crimes committed prior to its effective date.

The Nature of Gain Time

It is useful in the preliminary portion of this brief to examine the nature of gain time in Florida. At the time of the offense in question Florida law specified several means by which prisoners could have been released from prison prior to that time specified in a court ordered sentence. Among such procedures are pardon, parole, the earning of gain time for good conduct and the awarding of discretionary gain time. These pro-

cedures obviously differ in certain respects, some of which are significant in establishing that gain time for good conduct is an integral part of the sentence imposed upon a criminal defendant. Examination of these various alternatives not only establishes the relationship between the sentence and the earning of gain time for good conduct, but it also reveals the fallacy in the holding below that gain time for good conduct is an act of grace.

The procedural methods for obtaining pardon, parole or gain time vary greatly with regard to the administrative objectivity required in implementing each form of release. For example, the laws of Florida grant its governor, with the approval of three members of his cabinet, virtually unbridled power to grant full pardons by filing an appropriate order with the Department of State.[9] Section 940.01(1), Florida Statutes (1975). The statute tracks Article IV, Section 8(a) of the Florida Constitution which vests "sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *See also Sullivan* v. *Askew*, 348 So. 2d 312, 315 (Fla. 1977), *cert. denied*, 434 U.S. 878 (1977).

The Constitution of the State of Florida also provides that the Legislature may create a parole and probation commission with the power to supervise persons on probation and to grant paroles or conditional releases to persons sentenced for crimes. *See Fla. Const.* Art. IV, § 8(c). Such a commission has been established

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[9] This broad statutory power is not available in cases of treason and in cases where impeachment results in conviction. *See Fla. Stat* 940.01(2) (1975).

by Chapter 947, Florida Statutes. The commission's powers and duties include determining what persons shall be placed on parole and fixing the time and conditions of parole (as provided in Chapter 947). Fla. Stat. §947.13 (1975). The granting of parole, at times relevant to this action, was within the discretion of the Parole and Probation Commission under Sections 947.13 and 947.16(2) Florida Statutes (1975).[10] *See More* v. *Florida Parole and Probation Commission,* 289 So. 2d 719, (Fla. 1974), *cert. denied,* 417 U.S. 935 (1974) (citing *Marsh* v. *Garwood,* 65 So. 2d 15 (Fla. 1953)). Chapter 947 simply guaranteed a convicted criminal falling within its guidelines the right to proper consideration for parole.[11] *See More, supra.* Therefore, the parole process was similar to the pardon process as its implementation was dependent on the exercise of discretion. The principal distinction between parole and pardon is that parole does not terminate a sentence as does a full pardon, *See Sellers* v. *Bridges,* 15 So. 2d 293, 294 (Fla. 1943). Consequently, parole may be revoked upon a breach of its terms. *Id.* at 295. *See also* Fla. Stat. §947.21 (1977).

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[10] In 1978, Florida's legislature substantially modified Chapter 947 in passing the Objective Parole Guidelines Act of 1978. *See* Fla. Laws, Ch. 78-417, §3. The express intent for this amendment was to reduce the broad discretion previously afforded the Parole and Probation Commission by establishing objective criteria for paroling inmates. *See Fla. State.* §947.002 (1)(1979). Petitioner was sentenced prior to the passage of the aforesaid Act. Therefore, the background discussion in this brief deals with the Florida statutory scheme as it existed when petitioner allegedly committed that crime for which he was subsequently sentenced.

[11] The procedures for obtaining such proper consideration are specified in Chapter 947 and include an "interview" before a hearing examiner.

In stark contrast to either parole or pardon, the award of gain time for good conduct on a monthly basis is mandated by the applicable statute for "every prisoner who has committed no infraction of the rules of the Department [of corrections] or of the laws of the State and who has performed in a faithful, diligent, industrious, orderly and peaceful manner the work, duties and tasks assigned to him . . ." *Fla. Stat.* § 944.27(1) (1975).[12] The statute establishes expressly the specific amount of gain time which shall be awarded each prisoner on a monthly basis.

This gain time for good conduct must be distinguished from extra gain time described in Section 944.271, Florida Statutes (1975). That statute provides that the appropriate department "may allow in addition to time credits, extra good time allowances for meritorious conduct or exeptional industry." *Id.* As opposed to gain time for good conduct, extra gain time is merely permitted, not mandated. This is reflected on the face of Section 944.271 as it merely authorizes, but does not require, the granting of additional gain time.

Gain time for good conduct is unique among the procedures established in Florida with regard to obtaining early release; Section 944.27, Florida Statutes (1975)

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[12] As noted previously in the first portion of the Statement of the Case, the wording of the cited statute has been altered somewhat by the same amendment which reduced the amount of statutory gain time. *See* Fla. Laws, Ch. 78-304, § 1, modified at *Fla. Stat.* § 944.275(1) (1979) (as further amended by Fla. Laws, Ch. 79-3, § 56, by deleting the words "of Offender Rehabilitation" after the word "department").

requires the automatic granting of gain time to those prisoners who have committed no infractions of the law or Department of Corrections rules and who have performed assigned work in an appropriate manner. The means of achieving this reduction are almost totally within the control of the prisoner and are not conditioned upon subjective evaluations or comparisons. Thus, they can hardly be viewed as an extension of the grace of the sovereign retractible at will.

SUMMARY OF ARGUMENT

Application to petitioner of the decreased "3-6-9" schedule specified in the second statute violates the *ex post facto* prohibition. It operates retrospectively because it is aimed at prior acts. It amounts to the improper imposition of greater punishment than that specified by statutory provisions in effect at time of the commission of the offense, *Calder* v. *Bull,* 3 Dall. 386 (1798), alters the situation of petitioner to his disadvantage, *Kring* v. *Missouri,* 107 U.S. 221 (1883) and *Lindsey* v. *Washington,* 301 U.S. 397 (1937) or imposes unpleasant consequences upon petitioner for prior conduct, *DeVeau* v. *Braisted,* 363 U.S. 144 (1960).

The decisions of this Court closest in point factually are *Scafati* v. *Greenfield,* 390 U.S. 713 (1968), *affirming* 277 F.Supp 644 (D.Mass. 1967), and *Lindsey* v. *Washington, supra,* which respectively struck down provisions retrospectively restricting gain time acquisition by parole violators and mandating a formerly permissive sentence. The great weight of decisions of lower courts in cases in point supports the petitioner.

Although inapposite, the decision below was based on a theory of "absence of vesting". That theory in fact ignores the "vested" nature of constitutional rights and the reliance placed on existing law by sentencing courts and criminal defendants.

The state urges that it has an unrestricted right to alter rules for acquiring gain time by previously sentenced prisoners. This position flouts the recognition of the right to acquire gain time as a constitutionally protected liberty interest. Moreover, if sustained, it would remove any barrier whatever to arbitrary state legislative action and would drain the *ex post facto* clause of any viability in this area.

ARGUMENT

The statutory amendment in question violated the *ex post facto* prohibition of the federal Constitution because acting retrospectively it either imposed a greater punishment than that provided by the statutory provisions in effect at the time of the commission of the offense, altered the situation of petitioner to his disadvantage or imposed unpleasant consequences upon petitioner for prior conduct.

General Principles Relating to *Ex Post Facto*

This section will review the relevant principles of law articulated by this Court, which will then be examined in the light of holdings of other tribunals and related to the present case. *Ex post facto* laws have long

been a source of distrust, 1 *Blackstone's Commentaries* *46. The prohibition against them has occupied a particularly significant posture in American constitutional concepts. The Constitution of the United States from its adoption forbade enactment of *ex post facto* laws by either Congress or by state legislatures.[13] It has been emphasized that these protections of liberty were deemed of such importance by the Framers as to precede even the proposal to the states of the Bill of Rights. *Kring* v. *Missouri*, 107 U.S. 221 (1883). Although the constitutions of several of the original states contained similar restrictive provisions, there was a strong inclination to view *ex post facto* legislation as inherently invalid. Thus, in the first *ex post facto* case reviewed by this Court, the opinion was expressed that "[t]o maintain that our federal, or state, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican government." *Calder* v. *Bull*, 3 Dall. 386, 388-389 (1798) (opinion of Chase, J.). The *ex post facto* prohibition was viewed, however, as a significant additional safeguard against legislative tyranny. "The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws . . . " *Id.* at 389.

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[13] "No . . . *ex post facto law* . . . shall be passed." U.S. Const. art. I, § 9, cl. 3.

"No State shall . . . pass any . . . ex post facto law." U.S. Const. art I, § 10, cl. 1.

(Hereafter the two clauses are collectively termed "the *ex post facto* prohibition" or "the ex *post facto* clause," although only the second is here involved.)

In *The Federalist* No. 44, pp. 282-283, (Kendall and Caney ed., 1965), Madison corroborated Justice Chase's opinion that the *ex post facto* prohibition only served to formalize the view that such laws were inherently invidious:

> "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. . . . They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." *Id.* at 282-283.

It has been observed with regard to the importance to the Framers of the *ex post facto* clause:

> "So much importance did the Convention attach to it, that it is found twice in the Constitution: first as a restraint upon the power of the General Government, and afterwards as a limitation upon the legislative power of the States." *Kring* v. *Missouri*, 107 U.S. 221, 227 (1883).

To the same effect is this view expressed in *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Cal. L. Rev (1927):

> "The *ex post facto* clauses, in which may be included the prohibitions against bills of attainder, are

> restraints upon legislative excesses. That it was considered necessary to include them in the original Constitution is a commentary upon the importance attributed to them by the Framers. Such matters as freedom of religion, freedom of speech, freedom of the press, etc., came later in the first ten amendments and then only as restraints upon the federal government."

From the early days of the Republic, such laws have been denounced as "oppressive, unjust and tyrannical; and, as such, . . . condemned by the universal sentence of civilized man." *Ogden* v. *Saunders*, 12 Wheat. 213, 266 (1827) (opinion of Washington, J.) *Ex post facto* laws "were thoroughly disapproved by the Framers of our government and were intended by them to be completely impossible under our system." Crosskey, *The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539 (1947).

From the rendering of the seminal case of *Calder* v. *Bull*, 3 Dall. 386 (1798), this Court has consistently held that the *ex post facto* prohibition is applicable only to criminal cases or to cases involving penalties or forfeitures and not to conventional civil cases. *See, e.g.*, *Carpenter* v. *Pennsylvania*, 17 How. 456 (1855); *Baltimore & Susquehanna R.R. Co.* v. *Nesbit*, 10 How. 395 (1850); *Locke* v. *New Orleans*, 4 Wall 172 (1876); questioned in *Ogden* v. *Saunders*, 12 Wheat 213, 286 (1827); *Salterlee* v. *Matthewson*, 2 Pet. 380, 416 (1829) (opinions of Johnson, J., as to which see Note, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 329-330 (1922).

Within those parameters the classic statement relating to the *ex post facto* prohibition remains that of Justice Chase in *Calder* v. *Bull*.[14] To violate the *ex post facto* prohibition, the statute must be retrospective, although the converse is not necessarily true, i.e., a retrospective statute imposing a less onerous punishment would not be invalid as *ex post facto*. *Calder* v. *Bull*, 3 Dall. 386, 391 (1798). It remained for judicial construction to explore the meaning of the prohibition. The phrase "without explanation . . . is unintelligible, and means nothing" and "[l]iterally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed." *Id.* at 390. Rather than ascribe such a literal interpretation, it was deemed to accord with "the obvious meaning and intention of the prohibition" to hold that it was "inserted to secure the person of the subject from injury, or punishment, in consequence of such law." *Id.* at 390. Justice Chase, in an oft-cited pronouncement, then set forth classes of laws precluded by the *ex post facto* prohibition:

> "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was inno-

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[14] 3 Dall. 386 (1798). Although only one of several seriatim opinions the opinion of Justice Chase without question was early adopted by the Court. See *Cummings* v. *Missouri*, 4 Wall. 277 (1867). A later opinion referred to the Chase opinion as the "opinion of the court." *Kring* v. *Missouri*, 107 U.S. 221, 227 (1883). But see Crosskey, *The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U.Chi. L.Rev. 539, 558-559, n. 42 (1947).

> cent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *All these, and similar laws, are manifestly unjust and oppressive.*" *Id.* (latter two emphasized phrases supplied).

The present case manifestly involves a situation encompassed by the second category enumerated in *Calder* or, at the very least, is in the class of laws "similar" to that category. The subsequent cases which identify those matters included within the concept of infliction of greater punishment accordingly warrant examination. Thus, in *Cummings* v. *Missouri*, 4 Wall. 277 (1867) the Court struck down a provision of the Missouri Constitution requiring, *inter alia*, an oath by a priest in effect denying prior support of the Confederacy as a condition of further service in his ministry under pain of fine or imprisonment. In sustaining a claim that the oath violated the *ex post facto* prohibition the Court observed:

> "The disabilities created by the Constitution of Missouri must be regarded as penalties — they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to

take from him anything less than those is no punishment at all'. . . . "

"The theory upon which our political institution rests is, that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness. . . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Id.* at 320-322__.

In further analysis of the *ex post facto* prohibition the Court observed that although the Missouri constitutional provisions under attack did not by their terms define a crime or declare that any punishment be inflicted, nevertheless " . . . they produce the same result upon the parties against whom they are directed." *Id.* at 327.[15] The Court emphasized that the provisions were "*aimed at past acts and not future acts.*" *Id.* (emphasis added). The provisions not only in part criminalized prior innocent behavior, but with significance to the ins-

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[15] Not contra are cases relating to attachment of conditions to ongoing or continuing offenses; e.g., *Murphy* v. *Ramsey*, 114 U.S. 47 (1885) (disenfranchisement arising from an existing state of bigamy or polygamy held not retroactive); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Gryger* v. *Burke*, 334 U.S. 728 (1948) (imposition of enhanced sentence under habitual offender statute is punishment for the later offense); *Samuels* v. *McCurdy*, 267 U.S. 188 (1925) (imposition of penalty for continued possession of liquor obtained before enactment of law). See, however, *Hawker* v. *New York*, 170 U.S. 189 (1898), holding that a statute enacted subsequent to a felony conviction could be enforced to preclude a physician from the practice of medicine as a proper exercise of police power to insure proper qualifications for future practice of medicine and purporting to distinguish *Cummings*. *Accord*, *Reetz* v. *Michigan*, 188 U.S. 505 (1903); *Garner* v. *Board* 341 U.S. 716 (1951).

tant case were held to have imposed additional punishment after the fact to certain acts which were already punishable:

> "Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law —— 'they imposed additional punishment to that prescribed when the act was committed.' " *Id.* at 328.

On the same day the Court struck down the application of an Act of Congress to an attorney who declined to take an analogous oath. *In the Matter of Garland*, 4 Wall. 333 (1867). *See also Pierce* v. *Carskadon*, 16 Wall. 234 (1873) (following *Cummings* in invalidating West Virginia test oath).

In *Kring* v. *Missouri*, 107 U.S. 221 (1883), the Court addressed itself to the attempted application to a defendant of a change in Missouri statutory law subsequent to the commission of the offense which had the effect of denying to the defendant on retrial the benefit of an earlier plea of guilty to a lesser offense. Under previously existing law, that plea would have operated as an acquittal of the principal charge. This denial on retrial resulted in imposition of the death penalty in lieu of the former sentence of 25 years. Answering the claim that this was a change in procedure relating to the effect of a plea, the Court observed:

> " . . . can any substantial right which the law gave the defendant at the time to which his guilt relates,

> be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." *Id.* at 232.

Adopting the tests set forth in *United States* v. *Hall*, 26 F. Cas. 84 (No. 15 285) (C.C.D. Pa) (1809), (Washington, J. on circuit), aff'd 6 Cranch 171 (1810), and in *Hartung* v. *People*, 22 N.Y. 95 (1860) the Court in *Kring* concluded:

> "We are of the opinion that any law passed after the commission of an offence, which . . . '*[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage,*' is an *ex post facto* law, and . . . '[n]o one can be criminally punished in this country, except according to a law prescribed for the government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.' " 107 U.S. at 235 (first emphasis supplied).

In accord is *In the Matter of Medley*, 134 U.S. 160 (1890), which articulated not only the *Calder* "greater punishment" test but relied upon the "altering to disadvantage" test recognized in *Kring*. In so doing, the Court struck down a retroactive imposition of solitary confinement upon a prisoner sentenced to death observing that it was not "a mere unimportant regulation as to the safekeeping of the prisoner," *id.* at 167, and in fact "was an additional punishment of the most important and painful character." *Id.* at 171. Held equally defective was a statutory provision permitting the warden to establish a time of death without advising the prisoner.

In so holding, the Court elaborated upon the feature of enhanced punishment:

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an *immense mental anxiety amounting to a great increase of the offender's punishment.*" *Id.* at 172 (latter emphasis supplied).

Of equal, if not greater, relevance in review of the standards employed in earlier cases is *Lindsey* v. *Washington*, 301 U.S. 397 (1937). There the Court struck down as *ex post facto* a Washington statute requiring imposition of a mandatory maximum sentence which under the former statute had been subject to discretion of the trial judge. Noting that for the purpose of applying the *ex post facto* prohibition it would accept the meaning ascribed to the statute by the highest court of the state, nevertheless the Court held that it would

apply a federal standard in determination of the question of whether a prohibited *ex post facto* law was present. *Id.* at 400.

The Court then examined whether the subsequent standard of punishment in fact was more onerous than the earlier one. In so doing it considered the ancillary effects of the state parole process:

> " . . . The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. . . . *It is for this reason that an increase in the possible penalty is ex post facto, regardless of the length of the sentence actually imposed*, . . . since the measure of punishment prescribed by the later statute is more severe than that of the earlier. . . .
>
> Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. . . . Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. *We need not inquire whether this is technically an increase in the punishment annexed to the crime. . . . It is plainly to the*

> *substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.*" *Id.* at 401-402 (emphasis supplied).

It is manifest that if deprivation of an opportunity for consideration for a lesser sentence by a trial judge is fatal, loss of the right to earn gain time is equally, if not more, defective.

Of importance is the test adopted in the plurality opinion in *De Veau* v. *Braisted*, 363 U.S. 144 (1960), upholding restrictions on employment of felons in waterfront employment:

> "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. *The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity*, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. *Id.* at 160 (emphasis supplied).

The greater punishment test of *Calder*, the "altering to disadvantage test" of *Kring* and *Medley* (expressed as "substantial disadvantage" in *Lindsey*) and the "unpleasant consequences" test of *De Veau* led naturally to the decision in the case closest in point factually to the present case.

The memorandum affirmance in *Scafati* v. *Greenfield*, 390 U.S. 713 (1968), *affirming* 277 F. Supp. 644

(D. Mass. 1967), is almost squarely in point factually and legally. That decision affirmed a three judge district court which had held that a Massachusetts statute forbidding a prisoner from earning good conduct deductions for six months following reincarceration for parole violation could not be applied to a prisoner originally sentenced under statutes lacking such a prohibition even though he was paroled subsequent to the effective date of the second statute. Speaking through Circuit Judge Aldrich, the district court had held:

> " . . . we see no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for and hence earn, parole. Each, to quote In re Medley, . . . materially 'alters the situation of the accused to his disadvantage.' " 277 F. Supp. at 646.

The only distinction between *Scafati* and the instant case is that in *Scafati* there was a *complete* denial of the right to earn gain time for a *limited* period, whereas in this case there is a *substantial*, albeit not total denial, for the entire remainder of the sentence, *i.e.* here there is a limited loss for the total time *vis-a-vis* total loss for a limited time in *Scafati*. That it was a memorandum affirmance does not detract from its status as a judgment on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). Apparently, the Supreme Court of Florida, in the instant case, viewed as significant the fact that the right to earn gain time was not "eliminated" (376 So. 2d at 857) (A 22a), although, of course, it did not discuss or cite *Scafati*, nor did it explain at what point deprivation became "elimination".

In *Warden* v. *Marrero*, 417 U.S. 653 (1974), the Court analyzed the nature of punitive sanctions in a context furnishing illumination to this case. In construing the definition of "punishment" in a saving clause that was argued to preserve a "no-parole" statute, the Court observed:

> "First, *only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . For the confined prisoner, parole — even with its constraints — is a long step toward regaining lost freedom.* An observation made in somewhat different context is apt: 'It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offences, . . . this is in the nature of an additional penalty.' [Citation omitted.]
>
> "Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause of Art. I, §9, cl. 3, of the Constitution of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.' " *Id.* at 663 (first emphasis added) (footnote omitted).

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court, *inter alia*, considered the extent to which the Due Process Clause of the Fourteenth Amendment related to prison disciplinary proceedings, including loss of gain time. The Court clearly recognized that loss of gain time credits was a punishment "which affects the term of confinement." *ID.* at 547. Although not equivalent to

parole, the Court observed that "the deprivation of good time is unquestionably a matter of considerable importance." *Id.* at 561.

The Court further stated:

> "We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest. . . . ' But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State-created right is not arbitrarily abrogated." *Id.* at 556-557.

Although *Wolff* involved loss of gain time already accrued, the view that such accrued time is a liberty in-

terest logically supports the present contention that arbitrary deprivation or reduction of the right to acquire such gain time affects liberty and thus constitutes punishment.

In passing, the case of *Dobbert* v. *Florida*, 432 U.S. 282 (1977) must be mentioned. It did present an issue of retroactive denial of parole, which, if decided, might have been relevant to the present case. However, the defendant was held to be without standing. The Court held:

> "Petitioner's third ex post facto contention is based on the fact that the new Florida statute provides that anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole. The prior statute contained no such limitation. . . . Petitioner contends that nonetheless its enactment by the Florida Legislature amounts to an ex post facto law, and that because of this he may successfully challenge the death sentence imposed upon him.
>
> Petitioner, of course, did not receive a life sentence, and so any added onus attaching to it as a result of the change in Florida law had no effect on him." *Id.* at 298.

The decisions of this Court in summary hold that an *ex post facto* law is a statute with retrospective features aimed at past acts operating in a criminal case (1) inflicting a punishment greater than that provided by statutes in effect at the time of the commission of the offense, (2) having a similar effect to the first category, (3) altering the situation of a criminal defendant as

established by prior law to his substantial disadvantage, or (4) imposing unpleasant consequences upon a prisoner for prior conduct. Alteration of sentencing discretion, deprivation of opportunity to acquire parole, infliction of mental anxiety and complete denial of the right to acquire gain time for a limited period clearly have been held within those parameters. The *substantial* reduction of opportunity to acquire gain time must conceptually be viewed in the same light. This is particularly true because gain time is a constitutionally protected liberty interest. As will be demonstrated, the lower courts have overwhelmingly so held in gain time cases. The result below was bottomed, instead, upon the almost universally rejected "act of grace" view which, in any event, will not withstand critical analysis.

Application Of General Principles In State And Lower Federal Courts

Gain Time

The question of the applicability of *ex post facto* clauses, both of the federal and state constitutions, has arisen numerous times in proceedings in state and lower federal courts. In the vast majority of such circumstances, the courts have agreed that the *ex post facto* clause is applicable to legislative or administrative action which deprives a prisoner of the opportunity to earn gain time when such legislative or administrative action is taken after the time of the offense.

Three very recent decisions, *Adkins* v. *Bordenkircher,* 262 S.E. 2d 885 (W. Va. 1980), *Dunn* v. *Jenkins,* 377 N.E. 2d 868 (Ind. 1978) and *State ex rel. Bickman* v. *Dees,* 367 So. 2d 283 (La. 1978), decided the issues identical to those before this Court. In these cases, legislation (*Dunn* and *Bickman*) or legislation combined with executive action (*Bordenkircher*) promulgated after the time of the offense reduced the amount of gain time per month which could be earned by a prisoner. In these cases the courts found the changes to violate the ex post facto clauses of the United States and their respective state constitutions. In *Dees,* the Louisiana Court relied on its earlier decision in *State* v. *Curtis,* 363 So. 2d 1375 (La. 1978), in which the court discussed the theory of lack of "vested rights," utilized by the Florida Supreme Court in *Harris* v. *Wainwright,* 376 So. 2d 855 (Fla. 1979), to deny petitioner the relief he now seeks before this Court. In rejecting that view in favor of the ruling of this Court in *Lindsey* v. *Washington,* 301 U.S. 397 (1937), the Louisiana court concluded:

> "There is no analytical distinction between eligibility for parole (and analogously probation) and eligibility for dimunition of sentence through good time. *In neither situation is there a vested right.* Indeed at the time of commission of the offense in each situation the law simply provides opportunity for an accused later convicted that during the course of serving his sentence, he will be able to try to earn early release from confinement. In each case 'release eligibility' (a phrase used in *Lindsey* v. *Washington, supra* . . .) is significantly affected." 363 So. 2d at 1382-83 (emphasis added).

Most of the courts dealing with the issue have decided that the *ex post facto* prohibition prevents withdrawal, after the date of the offense, of the right to earn gain time for such offense. They have, at least by implication, held such statutory provision for good time to be a part of the "law annexed to the crime, when committed".[16] This principle has been made quite explicit in a number of decisions. In *Dowd* v. *Sims,* 95 N.E. 2d 628 (Ind. 1950), the Indiana Supreme Court invalidated legislation passed subsequent to the prisoner's conviction, which legislation allowed the board of trustees of a prison to deprive the prisoner of gain time for a parole violation. The court expressly linked the gain time statute to the sentence:

> "The good time law then in effect at the time the offense was committed 'enters into the judgment as if written therein.' "

Id. at 630, *citing Woodward* v. *Murdock,* 124 Ind. 439, 444, 24 N.E. 1047, 1048 (1890). *Accord, State* v. *Ellsworth,* 380 P. 2d 886, 888 (Mont. 1963); *Application*

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[16] *But see Graham* v. *Thompson,* 246 F.2d 805, 807 (10th Cir. 1957). The *Graham* holding is a minority view. It clearly overlooks the realities of criminal practice in which defendant and court alike are peculiarly sensitive to the ever-present question, "How much time must I do?" Conversely, to suggest that the term "annexed" is to be construed literally would not only be an absurdity, but it would ignore the condemnation in *Calder* of "similar laws." 3 Dall. at 390. Petitioner also agrees with the Third Circuit's conclusion that the continued viability of *Graham* v. *Thompson* is questionable. *Geraghty* v. *United States Parole Commission,* 579 F.2d 238, 266-267 n. 136 (3d Cir. 1978), *rev'd in part on other grounds,* _____ U.S. _____, 63 L.Ed. 2d 479 (1980).

of Fredericks, 315 P.2d 1010 (Ore. 1937); *Ex Parte Ridley,* 106 P. 549, 555 (Okla. 1910).

The closeness of the connection between the sentence and good time is crystallized in *Durant* v. *United States,* 410 F.2d 689 (1st Cir. 1969). In that case, the First Circuit held that a federal district judge erred in failing to advise a criminal defendant, pleading guilty under Rule 11, Fed. R. Crim. P.,[17] that he would not be eligible for gain time. The court explained:

> "[T]he removal of hope due to the loss of all opportunities to earn 'good time' is a substantial deprivation, effecting a fundamental variation in sentence beyond mere calendar years. We do not suggest that a defendant need be given a detail of every consequence of his sentence, but the loss of something important enough to make a deprivation after sentence constitutionally impermissible, cf. *Greenfield* v. *Scafati,* 277 F. Supp. 644 (D. Mass. 1967), affirmed, 390 US 13, 88 S. Ct. 1409, 20 L. Ed 2d 250 (1968), is a matter of which a defendant should be informed in advance." (*Id.* at 692.)

The essence of that holding is that the opportunity to earn gain time, and therefore release, is so closely related to the sentence that Rule 11 requires the sentencing court to inform a defendant accordingly. It would be anomalous indeed for a court to hold that the oppor-

[17] Rule 11, Fed. R.Crim. P., provided, at the time of *Durant*: "The Court may refuse to accept a plea of guilty, and shall not accept such plea without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.*" (Emphasis added.)

tunity to earn gain time is a consequence of a guilty plea requiring a trial court to address a pleading defendant personally to inform him of its consequences, yet is not part of the "law annexed to the crime, when committed."[18]

The protection accorded by the courts of the various states to statutory gain time is of long standing. In *State* v. *Tyree,* 70 Kan. 208, 78 P. 525 (1904), the Kansas Supreme Court considered the case of a prisoner whose crime was committed before the passage of a new sentencing act, under which good time was not provided. The legislation in effect at the time of commission of the crime provided, as does the Florida legislation, for mandatory gain time for good behavior. The later legislation provided for discretionary good time only. The court stated:

> "The right of the appellant under the law as it existed when he committed the offense to have a deduction of his sentence for good behavior was taken away from him by the act of 1903. This deprived him of a substantial right, and made the law of 1903, as to him, ex post facto." 78 P. 526. *Accord, Ex parte Lee,* 177 Cal. 690, 171 P. 938 (1918)

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[18] The Florida Supreme Court has, by implication, held that *bail* provisions are part of the "law annexed to the crime." In *Greene* v. *State,* 238 So. 2d 296 (Fla. 1970), the Court invalidated on *ex post facto* grounds, the application of a statute denying bail on appeal to those convicted prior to the passage of the statute. The Court arguably concluded so explicitly, as it opined that the "[d]enial of defendants' release on bail pending appeal *attached to offenses* that were committed prior to the effective date of the statute." *Id.* at 301 (emphasis added).

An even earlier case is *Murphy* v. *Commonwealth*, 172 Mass. 264, 52 N.E. 505 (1899). In that case, the Supreme Judicial Court of Massachusetts construed a new statute omitting prior provisions for reduction in sentence for good behavior to be applicable only prospectively to those who committed crimes after the effective date of the statute. The court pointed out, based on earlier decisions, that good time provided "an assurance of the highest character that upon condition of good behavior the convict shall have the promised benefit of an earlier release." *Id.*, 52 N.E. at 508. Further, "the benefit promised in consideration of good behavior was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." *Id.* The Court concluded:

> "To have taken away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been, in effect, to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been ex post facto." *Id.*

As a result, the Supreme Judicial Court of Massachusetts construed the statute to have prospective operation only, applying the salutary principle by which courts construe statutes to avoid questions of constitutional construction.

Ex post facto protection likewise extends to the statutory reduction of the amount of money a prisoner

can earn by his labor to be credited against a fine imposed under a conviction. *In re Hunt,* 28 Tex. App. 361, 13 S.W. 145 (1890).

In re Canfield, 98 Mich. 644, 57 N.W. 807 (1894), held that a statute entitling a prisoner to good time deductions, as does the Florida statute, gives the convicted defendant a "conditional right" to a reduction of his sentence. 57 N.W. at 808. A statute passed after the date of his sentence, providing for accrual of good time at slower rate than that in effect at the time of the crime, like Florida's, was held to be

> "*ex post facto,* its effect being to increase, and not to mitigate, petitioner's punishment. It follows that he is entitled to credit upon the basis of the earlier statute. To this case the later act has no application." *Id.*

To the extent that the legislature mandates good time, one who commits a crime on a date when such a statute is in effect is entitled to have it applied to him. Any later statute whose "effect [is] to increase, and not to mitigate [the prisoner's] punishment" must, by this court's interpretations of the *ex post facto* clause, be unconstitutional.

Presenting the minority view, the Appellate Division of the Superior Court of New Jersey characterized parole, in the context of legislation withdrawing the opportunity to earn gain time for good behavior, as a matter of "legislative grace and not a thing of right." *Zink* v. *Lear,* 28 N.J. Super. 515, 101 A. 2d 72, 77 (N.J.

App. Div. 1953).[19] The court opined: "When sentence is imposed upon a defendant, there is no constitutional guaranty that the provisions regarding parole will remain constant; the only constitutional inhibition is that no law may be passed increasing the punishment for the crime committed." *Id.* With due respect, it is submitted that this reasoning is fallacious. Even if it be conceded that no prisoner, anywhere, has a right to earn gain time in the absence of legislation, the characterization of gain time as a matter of legislative grace completely begs the question of whether, once an offense has been committed, the *ex post facto* prohibition allows the gain time rules applicable to such crime to be changed.

To the extent that state courts have held a statutory revocation of gain time to be a matter of grace not implicating the *ex post facto* clause, *People ex rel. Kleinger* v. *Wilson,* 5 N.Y. Supp. 2d 934 (App. Div. 1938), such holdings are susceptible to being changed in view of the numerous contrary interpretations of the applicability of the ex post facto clause. *People ex rel. Richardson* v. *Deegan,* 312 N.Y. Supp. 2d 666 (App. Div. 1979), for example, by implication overrules the earlier New York decision.

Singleton v. *Shafer,* 313 F.Supp. 1094 (E.D. Pa. 1970), is one of the few contrary decisions to come out of the federal system. It provided that repeal of a gain

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[19] This language is quite similar to that of the Florida Supreme Court: "[T]he allowing of gain time is an act of grace . . . [which] may be withdrawn, modified or denied." *Harris* v. *Wainwright,* 376 So. 2d 855, 856 (Fla. 1979). (A 21a)

time statute did not violate the *ex post facto* clause as to petitioners. The court did not discuss whether any petitioner in that case had committed his crime prior to, or after, the effective date of the statute, but simply held that gain time was a matter of executive grace. *Id.* at 1095-1096. The case may no longer be good law. *Geraghty* v. *United States Parole Commission,* 579 F. 2d 238, 265-266 n. 136 (3d Cir. 1978), *rev'd in part on other grounds,* _____ U.S. _____, 63 L. Ed. 2d 479 (1980). Even if this authority were accepted as persuasive, it would not apply in the case at bar which involves mandatory legislative gain time, i.e., specific amounts of gain time which the legislature requires to be awarded for good behavior, rather than, as in *Singleton,* gain time awarded in the discretion of the executive branch of government.

Parole

Cases arising in the context of parole statutes and administrative policies have frequently brought the *ex post facto* prohibition into play. Not surprisingly, the issues arising under these cases are quite similar to those arising in cases dealing specifically with gain time. Conceptually, they should be indistinguishable for *ex post facto* purposes. *Cf. Wolff* v. *McDonnell,* 418 U.S. 539, 561 (1974). Indeed, they are more persuasive because the granting of parole, by its very nature, is a patently more subjective act than the mathematical accrual of gain time measured only by good conduct.

The claim is frequently made that statutes and administrative regulations concerning parole are a matter of legislative or executive grace, not of "right," and that therefore, the *ex post facto* prohibition is not implicated when an opportunity for parole is withdrawn from one who has committed a crime prior to the effective date of the withdrawal. Even where the decision to grant or deny parole is a matter of discretion with the corrections department, or "an act of grace" where the law "grants petitioners as a matter of right the *opportunity* to be considered for parole after serving a given period of time," a retroactive increase of this period "alters the situation of petitioners to their disadvantage, . . . and, as such, is prohibited by both the Wisconsin Constitution and the United States Constitution." *State ex rel. Mueller* v. *Powers,* 64 Wis. 2d 643, 221 N.W. 2d 692, 694 (Wis. 1974) (emphasis added). *Accord, Goldsworthy* v. *Hannifin,* 468 P.2d 350 (Nev. 1970). As long ago as 1924, the Supreme Court of Louisiana confronted the argument that parole was not a matter of right but a matter of discretion of the Parole Board. *State ex rel. Woodward* v. *Board of Parole,* 99 So. 534 (La. 1924). The court stated:

> "There can be no doubt but that the right to be considered for a parole . . . was a substantial one . . . Of course, the right was not absolute or fixed in the sense that he was bound to be paroled; but the privilege of having his case submitted to the discretion of the board at the proper time did exist; whereas, now, it is entirely taken away, and the Board cannot even consider it under the present law.

> It would seem clear, therefore, that to give the laws of 1916 a retrospective effect would operate seriously to his disadvantage, in violation of the inhibition of constitution against ex post facto laws." *Id.* at 536.

Not surprisingly in light of *Greenfield* v. *Scafati, supra,* the overwhelming weight of recent authority follows the rule that a law passed after the date of the offense which eliminates or delays a defendant's parole eligibility is *ex post facto* as applied to that defendant. *Davis* v. *Mabry,* 585 S.W. 2d 949 (Ark. 1979); *State* v. *Gone,* 587 P. 2d 1291 (Mont. 1978); *Ex parte Alegria,* 464 S.W. 2d 868 (Tex. Crim. App. 1971). *Accord, In re Griffin,* 48 Cal. Rptr. 183, 408 P.2d 959 (Cal. 1965). The Florida Supreme Court has itself applied this principle. *Lee* v. *State,* 294 So. 2d 305 (Fla. 1974), *overruled on other grounds,* 340 So. 2d 474 (Fla. 1976). Contrary cases are clearly in the minority. *State ex rel. Koalska* v. *Swenson,* 66 NW 2d 337 (Minn. 1954), appeal dismissed, *cert. denied,* 348 U.S. 908 (1955).[20]

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[20] *Petition of Beaton,* 241 N.E. 2d 845 (Mass. 1968) is clearly distinguishable from the case at bar in that the offense for which petitioner was being punished was committed while he was on parole, *after* the effective date of a new statute of which petitioner complained increased the punishment for such crimes. Such a statute is clearly akin to habitual offender statutes, which have passed constitutional muster. *Id.* at 848. *Greenfield* v. *Scafati, supra,* should be carefully distinguished from *Beaton.* The petitioner in *Scafati* committed no separate criminal offense, but merely violated parole terms. In *Beaton,* by contrast, the legislature added to the penalty for crimes committed while on parole, and the new statute was effective prior to the commission of the offense by petitioner. That result does not contradict *Scafati.*

The case of *Taylor* v. *Mississippi State Probation and Parole Board,* 365 So. 2d 621 (Miss. 1978) must not only be characterized as highly unusual, but as distinguishable. In that case, the statute remained the same, but, pursuant to an attorney general's opinion, the Parole Board changed its interpretation of the statute. *Id.* at 622. That case, therefore, is completely distinguishable from the case at bar in that, in this case, a statutory enactment passed after the date of the offense altered eligibility for good time. The Supreme Court of Mississippi went on to hold that *administrative decisions* "with regard to parole law eligibility" do not amount to law "annexed to the crime when committed." *Id.* at 623. This decision is of no weight in analyzing a statutory change.

The United States Courts of Appeals have on numerous occasions considered the applicability under the *ex post facto* clauses of new parole guidelines to prisoners convicted of offenses committed prior to the date of the promulgation of such guidelines. The majority of such decisions have found such changes, when applied to such prisoners, to violate the *ex post facto* clauses. Significantly, even those cases finding no violation of the *ex post facto* clause typically do so on the basis that the changes will not increase the punishment applicable to the prisoner, or will even have an ameliorative effect on the punishment.

The promulgation of new guidelines denying eligibility for parole, where under previous practice parole eligibility was immediate, violates the *ex post fac-*

to prohibition. *Rodriguez* v. *United States Parole Commission,* 594 F. 2d 170 (7th Cir. 1979). Although there was no guaranty that parole would be granted at any time, the court noted that the new guidelines retroactively eliminated an opportunity for parole release, to the "substantial disadvantage" of the prisoner. *Id.* at 175. Such reasoning is *a fortiori* applicable to the case of a prisoner for whom state law *requires* that a sentence be reduced by a certain amount, when the rate of reduction of such sentence is later changed to his disadvantage.

The sensitivity of the United States Courts of Appeals to this issue is demonstrated by the case of *DePeralta* v. *Garrison,* 575 F.2d 749 (9th Cir. 1978). In that case, the issue was the applicability of new regulations added in 1976 to a prisoner sentenced in 1973 under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(c). The new regulations provided that the severity of the prisoner's offense could be taken into account in determining eligibility for parole. *Id.* at 751. This factor had not previously been stated in the regulations as a factor to be considered by the Parole Commission. The court granted relief although there was no explicit finding that the application of the new regulations had the effect of increasing the prisoner's sentence. In this case, by contrast, there can be no question that the application of the new gain time rules will increase the sentence substantially.

Where the courts of appeals have considered findings that retroactive application of parole guidelines would increase the amount of time served, they have

been unanimous in finding such application to violate the *ex post facto* clauses. *Rodriguez* v. *United States Parole Commission, supra; Geraghty* v. *United States Parole Commission,* 579 F.2d 238 (3rd Cir. 1978), *reversed in part on other grounds,* _____ U.S. _____, 63 L.Ed 2d 479 (1980); *Shepard* v. *Taylor,* 556 F.2d 648 (2nd Cir. 1977); *Love* v. *Fitzharris,* 460 F.2d 382 (9th Cir 1972), *vacated as moot,* 409 U.S. 1100 (1973). *Accord, People of the United States ex rel. Umbenhowar* v. *McDonnell,* 11 F.Supp. 1014 (N.D. Ill. 1934).

Ruip v. *United States,* 555 F.2d 1331 (6th Cir. 1977) found that the adoption of flexible parole guidelines, to guide the discretion of the parole commission in determining whether a parole should be granted, did not violate the *ex post facto* prohibition. *Accord, Zeidman* v. *United States Parole Commission,* 593 F.2d 806 (7th Cir. 1979); *Rifai* v. *United States Parole Commission,* 586 F.2 695 (9th Cir. 1978). As the *Rifai* court pointed out, "[Petitioner] has not convinced us that he suffered greater punishment under the 1976 standards than he would have received under the pre-1976 scheme." *Id.* at 699. Therefore, there is authority in the courts of appeal that changes in guidelines informing the discretion of parole commissions do not implicate the *ex post facto* prohibition *where the petitioner cannot demonstrate that such changes had the effect of increasing the punishment for the crime.* Where they do have such effect, however, the courts of appeal have been unanimous in holding the change violative of the *ex post facto* clauses. See cases cited *supra; see also Breest* v. *Helgemoe,* 579 F.2d 95 (1st Cir. 1978), *cert. denied* 439 U.S. 933 (1979).

Probation

Just as parole cases strongly support the position of petitioner, so do the probation cases. Courts considering changes in probation eligibility have found such changes to violate the *ex post facto* clauses when they are enacted after the date of the offense. In *State* v. *Mendivil,* 121 Ariz. 600, 592 P.2d 1256 (Ariz. 1979), the Arizona Supreme Court found that an Arizona statute violated the *ex post facto* clauses of the Arizona and the United States Constitution when a statute, passed after the date of the offense, added a penalty of two years probation to a sentence for which the prior maximum was one year. *Id.*, 592 P.2d at 1257. While the court stated its agreement "that probation or parole is not a Constitutional right but a matter of legislative grace," *id.* at 1258, it joined with the overwhelming weight of authority stated *supra,* that

> "statutes detrimentally affecting parole eligibility are unconstitutional insofar as applied to a prisoner charged with commission of a crime prior to the enactment of the statute." *Id.* at 1258, *citing In Re Griffin, supra; State* v. *Ellsworth, supra; Goldsworthy* v. *Hannifin, supra; State ex rel. Mueller* v. *Powers, supra.*

The Supreme Court of Kentucky has held a statutory revocation of the opportunity of a prisoner convicted of certain classes of offenses to apply for "shock probation" to violate the *ex post facto* clauses. *Blondell* v. *Commonwealth of Kentucky,* 556 S.W. 2d 682 (Ky. 1977). The court acknowledged that it "may be

'legislative grace' for the General Assembly to provide for shock probation," but pointed out that

> "[w]hen [the General Assembly] expressly removes all hope of shock probation upon conviction and sentence for certain offenses, this is in the nature of an additional penalty." *Id.* at 684.

Cases Cited By The Florida Supreme Court

After the foregoing analysis of lower court decisions it is well to analyze in detail the authorities cited by the Florida Supreme Court in support of its decision in *Harris* v. *Wainwright,* 376 So. 2d 855 (Fla. 1979). Numerous cases are mentioned in support of its unqualified assertion that "gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied." *Id.* at 856. This bald statement cites a number of state and federal cases, none of which conclusively support the position of the State in the case at bar and several of which actually contradict it.

Gilstrap v. *Clemmer,* 284 F.2d 804 (4th Cir. 1960) does not discuss *ex post facto* principles, but merely provides that a parole violator who has his parole revoked could be recommitted under good conduct deduction provisions of a statute passed subsequent to the date of the original offense. The retrospective application of the new penalty apparently was not challenged, however, on *ex post facto* grounds, because the *ex post facto* prohibition is not discussed in the opinion at all. To the extent that the opinion holds that the legislature may increase the penalty for parole violations as to prisoners whose

offenses were committed prior to the date of such legislation, it has been overruled by *Scafati* v. *Greenfield,* 390 U.S. 713 (1968), affirming 277 F. Supp. 644 (D. Mass. 1967).

The *ex post facto* prohibition was similarly not at issue in *Hiatt* v. *Compagna,* 178 F. 2d 42 (5th Cir. 1949), *aff'd per curiam* (by an equally divided court), 340 U.S. 880 (1950). In that case, petitioners were paroled and, after some unfavorable newspaper publicity, had their paroles revoked by the parole board after an informal hearing excluding petitioners' counsel. While the *ex post facto* prohibition was not discussed, the Fifth Circuit did hold in essence that the simple appearance of petitioners before the parole board satisfied due process. In dissent, Judge Waller pointed out that statutes requiring petitioners to be afforded an opportunity to appear before the parole board

> "[w]ere intended to require the Board to comply with the Constitutional prohibition against the deprivation of liberty without an opportunity to be heard, and the appearance allowed [petitioners] in this case afforded no such opportunity to be heard as the law and the Constitution contemplate." *Id.* at 47.

It is respectfully submitted that the dissenting opinion in that case states the law as it has been enunciated since by this Court, in *Morrissey* v. *Brewer,* 408 U.S. 471, 489 (1972). In any event, the stare decisis impact of the decision in *Hiatt* is obviously diminished by its having been affirmed by an equally divided court.

Estabrook v. *King,* 119 F.2d 607 (8th Cir. 1941) held that a statute allowing a convicted prisoner to be transferred to a hospital for "defective delinquents" and lose accrued good time did not vitiate the *ex post facto* prohibition in spite of that statute having been passed after the date of prisoner's conviction and sentencing. Like the decision below in the case at bar, the opinion in *Estabrook* discussed none of this Court's decisions concerning the *ex post facto* clause but merely relied on a characterization of good time allowance as "contingent" rather than "vested." Quoting *Douglas* v. *King,* 110 F. 2d 911 (8th Cir. 1940), the court stated: "Congress having extended the privilege, might withdraw it, except as to those persons in whom the privilege had ripened into a vested right." 119 F. 2d at 609. The citation to *Douglas* v. *King,* however, was inapposite, in that the *ex post facto* clause was not implicated in *Douglas.* In *Douglas,* petitioner was convicted on December 22, 1931, and the issue was the application as to him of the same defective delinquent statute, which came into effect on May 13, 1930. Although the date of petitioner's offense in *Douglas* is not a matter of record in that case, it certainly is not clear that the offense took place prior to the effective date of the defective delinquent statute.

Kastel v. *Fish,* 36 F. Supp. 700 (D. Md. 1931) held a decrease in discretionary good time allowance to be valid as applied to those convicted prior to the date of the change. The applicability of the *ex post factor* prohibition was not discussed by the court. In any event,

the case involved only discretionary good time and not mandatory good time as in the case at bar.

Shattuck v. *Grider,* 493 P. 2d 829 (Okla. Crim. App. 1972) holds only that a legislature may constitutionally provide for withdrawal of good time as a penalty for violation of parole. The applicability of the *ex post facto* clause was not raised by the pleadings or the facts in that case.

People ex rel. Colletti v. *Pate,* 31 Ill. 2d 354, 201 N.E. 2d 390 (Ill. 1964) held only that a legislature may validly delegate to an executive department the authority to prescribe a schedule of good time credits. Once again, no *ex post facto* issue was raised in the pleadings or even by the facts of that case.

Comerford v. *Commissioner of Correction,* 335 Mass. 714, 141 N.E. 2d 893 (Mass. 1957) discussed a change in the gain time statute *increasing* the amount of gain time for good behavior from six days to twelve and one-half days per month and eliminating entirely a four-day per month accrual of gain time for satisfactory work. While no *ex post facto* issue was discussed by the opinion, obviously the change made was ameliorative, not "alter[ing] the situation of [the accused] to his disadvantage." *Kring* v. *Missouri,* 107 U.S. 221, 235 (1883).

Lembersky v. *Parole Board of Department of Correction,* 332 Mass. 290, 124 N.E. 2d 521 (Mass. 1955) determined that a statute enacted subsequent to the commission of the offense, which provided for the same

rate of accrual of good time as the previous statute and merely changed the agency which would determine forfeiture of good time for parole violations, did not work to the disadvantage of the petitioner. The case is obviously distinguishable in that in the present case there can be no disputing that the second statute works to the disadvantage of the petitioner. *Lembersky* actually undercuts the opinion of the Florida Supreme Court below, in that the clear implication of the decision is that, had the change worked to the disadvantage of the petitioner, such change would have been invalidated. The court was explicit that petitioner could not "be subjected to a penalty more severe than that in force when the act was performed." *Id.* at 524.

Mayo v. *Lukers,* 53 So. 2d 916 (Fla. 1951) held that a petitioner whose parole was revoked was not entitled to have the unserved portion of his original sentence diminished by the time he was out on parole and that gain time could validly be forfeited upon a parole violation. The *ex post facto* prohibition was not implicated in the decision.

Dear v. *Mayo,* 153 Fla. 164, 14 So. 2d 267 (1943), *cert. denied,* 320 U.S. 766 (1943), provided only that gain time may be revoked for a parole violation. *Kimmons* v. *Wainwright,* 338 So. 2d 239 (Fla. 1st DCA 1976), *cert. denied,* 434 U.S. 843 (1977), is to the same effect. Neither case involved an *ex post facto* issue, nor under the facts therein could one have been raised.

The treatment of the cases distinguished by the Florida Supreme Court is revealing. *Dowd* v. *Sims,* 229

Ind. 54, 95 N.E. 2d 628 (Ind. 1950), for example, invalidated legislation, passed subsequent to the prisoner's conviction, which allowed the prison's board of trustees to deprive the prisoner of good time for parole violation. To distinguish this case, which is factually and legally identical to *Greenfield* v. *Scafati,* 390 U.S. 713 (1960), the Florida Supreme Court stated, "this is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations." No analysis was offered illuminating the purported distinction between the reduction and the elimination of gain time.

The Florida Supreme Court distinguished *Goldsworthy* v. *Hannifin,* 468 P. 2d 350 (Nev. 1970) on the basis that "[t]his is not a situation in which the entire scheme of criminal penalties has been revised." *Id.* at 857. A simple persual of *Goldsworthy* reveals that the revision to which the Florida Supreme Court refers was not even a matter under consideration by the *Goldsworthy* court. That court stated:

> "On July 1, 1967, the entire scheme of handling criminal penalties in the State of Nevada was changed by the legislature from indefinite to definite sentencing. *A concomitant change was made in the statute dealing with eligibility for parole to make it compatible with the new penalty scheme."* 468 P. 2d at 351 (emphasis added).

It was the change in parole eligibility, not the "entire scheme," which the *Goldsworthy* court considered and found constitutionally wanting because it provided

later parole eligibility for a prisoner convicted of a crime committed prior to July 1, 1967. The only difference of substance between *Goldsworthy* and the case at bar is that *Goldsworthy* involved eligibility for parole consideration and the instant case involved good time.

Two California cases, *In re Dewing,* 19 Cal. 3d 54, 136 Cal. Rptr. 708, 560 P. 2d 375 (1977) and *In re Valenzuela,* 275 Cal. App. 2d 483, 79 Cal. Rptr. 760 (3d Dist. 1969), were also distinguished. In both these cases, legislation passed subsequent to the date of the criminal offenses in question extended the maximum period of custody that could be imposed upon the petitioners. On the basis of *ex post facto* principles, both courts found such legislation to violate the *ex post facto* prohibitions of both the federal and California Constitutions. The Florida Supreme Court distinguished these cases as follows:

> "It is not a situation in which the length of incarceration for juvenile offenders has been extended." *Harris* v. *Wainwright,* 376 So. 2d at 857.

The fact that juveniles were involved in both those cases had nothing whatever to do with the applicability of *ex post facto* principles to the case.

Love v. *Fitzharris,* 460 F. 2d 382 (9th Cir. 1972), *vacated as moot,* 409 U.S. 1100 (1973) held an administrative change in parole regulations delaying petitioner's parole eligibility violated the *ex post facto* prohibition. The Florida Supreme Court, contrasting the case at bar, notes that "it is not a situation involving a

new and different interpretation of existing law." 376 So. 2d at 857. That distinction, of course, inures to the benefit of petitioner; where some courts have found difficulty applying the *ex post facto* prohibition to mere changes in guidelines or administrative interpretations by executive departments, e.g., *Taylor* v. *Mississippi State Probation and Parole Board, 365 So. 2d 621 (Miss. 1978) on the basis that they are not part of the "law annexed to the crime," to suggest that the ex post facto* prohibition applies only to new administrative interpretations and not to new statutory enactments is, quite simply, illogical.

Analysis of the Present Case in Light of Prior Decisions

Viewed in the light of the controlling decisions of this Court, there can be no doubt that the application to petitioner of the diminished gain time schedule prescribed by the second statute is forbidden by the *ex post facto* prohibition. Such a conclusion has already been reached by the overwhelming majority of lower courts confronted with the identical issue.

Firstly, this case should be regarded as controlled by *Scafati* v. *Greenfield*, 390 U.S. 713 (1968). The only possible factual "distinction" lies in the difference between total loss of the right to acquire gain time for a limited period and significant loss for a total period. If this were a legally cognizable distinction (and no court has so stated), it must lie in favor of petitioner because

application to petitioner of the *Scafati* penalty would penalize him at most 90 days (loss of maximum of fifteen days allowance under the first Florida statute for six months) as contrasted with the actual penalty of more than two years.

In a broader sense the position espoused by petitioner is indistinguishable from the result in *Lindsey* v. *Washington*, 301 U.S. 397 (1937). There the Court invalidated the alteration of a prescribed sentencing period from a permissive maximum within the discretion of the trial court to a mandatory period. The Court found a violation of the *ex post facto* clause in the deprivation of the right to be considered for the lesser sentence. In the instant case the existing law in question was not the subjective order of a trial judge; rather it attached as a matter of law to the sentence affording the petitioner himself the right to earn under objectively stated conditions an earlier release. If loss of opportunity for consideration be fatal, loss of right to earn should be viewed in the same light.

Even if *Scafati* and *Lindsey* are to be ignored, as they were below, the instant case manifestly meets the criteria generally established by this Court and almost universally applied in this situation by lower courts. The second statute most assuredly operates in a criminal case with retrospective features.[21] It clearly inflicts punish-

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[21] It is retrospective by the Florida Court's own definition. "*A law is retroactive or retrospective* if it takes away or impairs vested rights acquired under existing laws, or *if it . . . attaches a new disability in respect to transactions or considerations already past.*" *Heberle* v. *P.R.O. Liquidating Co.*, 186 So. 2d 281, 282 (Fla. DCA 1st 1966) (footnote omitted)(emphasis supplied).

ment greater than the statutes relating to the same subject which were in effect at time of the commission of the offense. *Calder* v. *Bull*, 3 Dall. 386 (1798). Ultimately, it alters the situation of petitioner substantially to his disadvantage (*Kring* v. *Missouri*, 107 U.S. 221 (1883) and *Lindsey* v. *Washington*, 301 U.S. 397 (1937)), or imposes unpleasant consequences upon petitioner for prior conduct (*De Veau* v. *Braisted*, 363 U.S. 144 (1960)).

The state has not quarreled with these precepts. Indeed it never has sought in these proceedings to demonstrate any state interest served by its application of the second statute to petitioner. Instead it below relied only on an alleged lack of vesting or stated differently the notion that gain time is an act of grace. To argue contractual concepts in dealing with constitutional principles is misplaced. *See State* v. *Curtis*, 363 So. 2d 1375, 1382-1383 (La. 1978). However, if relevant, it can be argued more convincingly that the petitioner's right that he be confined and thus deprived of his liberty only under law is indeed "vested" in the sense that it is a right which cannot be altered contrary to the fundamental law found in the *ex post facto* clause. Assuredly, the nature of the fundamental social compact cannot be so cavalierly disregarded. *Cf.* Madison, *The Federalist* No. 44 pp. 282-283 (Kendall and Caney, ed. 1965).

Moreover, the state's argument misses the point. Even if gain time were to be viewed as an act of grace, it cannot be urged that once established, the opportunity to earn gain time can be abolished or drastically reduced

without violation of the *ex post facto* prohibition. Once the right to earn has been established, its alteration certainly is subject to federal constitutional restrictions. As noted in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), once the state has granted the right to earn gain time, that right becomes a "liberty" interest subject to the procedural protections of the Fourteenth Amendment.[22] Conceptually, there is no difference in the instant case. A liberty interest so protected necessarily is also a liberty interest whose deprivation results in a forbidden increase in punishment. There is no real distinction between denial of leniency and enhancement of punishment. In *Roberts* v. *United States*, _____ U.S. _____, 63 L.Ed. 2d 622 (1980), this court noted:

> "We doubt a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Id.* at 628 n.4.

See also *Warden* v. *Marrero*, 417 U.S. 653, 663 (1974) suggesting that removal of hope of parole, even if originally viewed as "legislative grace", would be in the nature of an additional penalty.

Casting further doubt on the absence of vesting theory, it must be recognized that here there is a con-

[22] Of at least some relevance is the fact that the opportunity to acquire release (on parole) tempered the Eighth Amendment analysis of the Texas recidivist statute in *Rummel* v. *Estelle*, _____ U.S. _____, 63 L.Ed. 2d 382, 395 (1980). It is dubious that parole would have been so considered were it subject constitutionally to arbitrary withdrawal.

siderable "reliance" interest. Although it may be idle to contend that a crime is committed in "reliance" on any requirement or lack of requirement of the law, it is quite realistic to suggest that from the time of trial or sentencing, many decisions are made in "reliance" on the existing state of the law. Although the nature of the historical evolution of *ex post facto* doctrine has made the date of the offense the dividing point, *Calder* v. *Bull*, 3 Dall. 386 (1798), it is not without significance that in this case a negotiated plea of guilty was entered before the date of statutory change. It is manifest that gain time is an integral part of a sentence. It is an axiom in the combative atmosphere of the American criminal justice system that prosecutor, defendant, and judge alike are all attuned to *actual* as opposed to theoretical punishment. "Gain time reduces the length of time required to be served on a sentence." Note, *Prisoners' Gain Time: Incentive, Detriment or Ritual Response?*, 21 U.Fla. L.Rev 103, 104 (1968). In Florida, gain time is viewed a positive incentive to encourage orderly conduct and *early* rehabilitation. *Nicholas* v. *Wainwright*, 152 So. 2d 458 (Fla. 1963). Only the "unusual prisoner" described in *Warden* v. *Marrero*, 417 U.S. 653, 663 (1974) would not view loss of opportunity to acquire gain time as a penalty.

Even more importantly the sentencing court would have the same concern. Unlike parole, gain time establishes a mandatory release date that controls the length of incarceration except to the extent that gain time has been forfeited for misconduct. Thus, it is abun-

dantly clear that gain time is, indeed, part of the sentence, and it has been so considered by members of the judiciary. To argue otherwise would be to argue that a court is presumed *not* to know the law.

As stated by then District Judge Jon O. Newman, now United States Circuit Judge for the Second Circuit and former United States Attorney for the District of Connecticut,

> "American sentencing is afflicted with the Slovik[23] syndrome: the expectation that the sentence will not be fully carried out. . . . Has anyone realized how frequently the different sentences simply reflect the different expectations of the sentencing judges as to what proportion of the sentence the offender will serve before being paroled?" Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 *Yale L.J.* 810, 812 (1975).

A fortiori this observation as to parole is true of gain time. This conclusion is supported by published reports of various sentencing institutes designed for an attended by members of the federal judiciary.

Most significantly with regard to the case at bar, sentencing institutes for federal trial judges often include informative instruction with regard to the treatment of gain time under comparable federal statutes. For exam-

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[23] The reference is to *United States* v. *Slovik*, the case of an American soldier executed for desertion in World War II. The members of the court-martial apparently felt the death sentence awarded would not be imposed.

ple, documents that were utilized in one sentencing institute included a specific instruction stating:

> "In determining sentence, note that the behavioral 'good time' is earned at the rate of at least five days per month (§4161) and industrial 'good time' is earned at the rate of approximately two days per month (§4162), but that accumulated 'good time' is forfeited by bad behavior." (Citations are to Title 18 of the United States Code). *Paper Delivered at the Institute on Sentencing for United States Judges*, 35 F.R.D. 381 (1964).

Similarly, the Honorable Walter B. Hoffman noted that Title 18, United States Code §§4161-4163 provide a "mandatory release provision." Hoffman, *Purposes and Philosophy of Sentencing*, 75 F.R.D. 287, 295 (1977). Judge Hoffman further stated that the good time allowances prescribed by the cited statutes are "available where the record of conduct shows a faithful observance of all rules and [the prisoner] not being subjected to punishment." *Id.* He also referred to industrial good time and good time allowance for the performance of exceptionally meritorious service. *Id.* at 296. Judge Hoffman expressly recognized that release "follows as a matter of course, with the sentence being credited by the good time allowances. . . . " *Id.* He contrasted this type of release from eligibility for parole which "is *not* a mandatory release." *Id.* (emphasis original). A similar discussion of good time can be found in Partridge, Chase & Eldridge, *The Sentencing Options of Federal District Judges*, 84 F.R.D. 175, 180, 183-184 (1979).

It therefore would be unrealistic to contend that gain time is a mere procedural creature of the legislature, subject to its arbitrary whim and caprice. To so urge is to ignore that its existence and its specific provisions are in the forefront both of the thoughts of those who plead guilty (or indeed of those who risk trial) and those who sentence. Surely, the state cannot suggest that there is no possibility that the sentencing judge in this case would not have inflicted a lesser sentence had he been given fair warning of the new gain time schedule.

It is clear that the second statute is "retrospective" within the meaning of *Calder*. It is retrospective because it takes notice of the past, and in so doing, alters an existing punishment for past misconduct. It is "aimed at past acts and not future acts." *Dummings* v. *Missouri*, 4 Wall. 277, 327 (1867). It is directly related to acquisition of gain time as a reduction of a sentence which was imposed as a punishment for prior behavior. The offense in question has occurred — its commission cannot be deterred. The reduction in gain time serves only to enhance punishment for that past offense by reducing the benefits to be acquired by *good conduct*. Obviously, it does not operate to punish *future misconduct*.[24] Had

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[24] Of course, it might be argued that the "3-6-9" schedule of the second statute operates to reward good behavior (and thus deter misconduct) on the same theory as did the former "5-10-15" schedule. Thus it would postulate that a lesser reward still rewards and does not punish. On that theory, failure to implement capital punishment could serve as an ostensible reward. This theory also ignores the lack of a realistic distinction between increased punishment and a lessened reward. *Cf. Roberts* v. *United States*, _____ U.S. _____ 63 L.Ed 2d 622, 628 n. 4 (1980).

that been the intent of the Legislature, it would have dealt with the *consequences of future misconduct* by prisoners, e.g., prescribing a definition of a criminal offense with appropriate penalty or deprivation of future privileges after following procedures in keeping with *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

The second statute is not saved because the decreased gain time schedule only operates after the effective date. Such sophistry would save any *ex post facto* law. Indeed, under that fallacious reasoning, Florida could justify extension of the length of a sentence provided time already served was credited toward the enhanced sentence. It has been stated that " . . . a statute may be retrospective even if it does not purport to have effect prior to its enactment. . . " Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). The instant statute clearly focuses on prior conduct and not the future. *Cf. DeVeau* v. *Braisted*, 363 U.S. 144 (1960).

Lurking in this case is the unanswerable question as to when, if at all, reduction would become the equivalent of complete deprivation. If the present alteration of 40 percent is permissible, under what rule of law would a 90 percent reduction be invalidated? These rhetorical questions demonstrate the soundness of the action of the Framers in denying a legislative body even the opportunity to act *ex post facto*.

An enlightening analysis is found in Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L.Rev. 1491, 1501 (1975):

> " . . . in deciding whether a law is proscribed by the *ex post facto* prohibition, a court should consider three factors: first, does the law penalize activities in the absence of fair warning and frustrate reasonable reliance on existing laws; second, can the law serve its ostensible purpose — for instance, does the law attempt to regulate behavior through threats of unpleasant consequences where deterrence is no longer possible; and, finally, could the law have been a consequence of legislative vindictiveness."

All of these questions are answered in the affirmative on this record. The *ex post facto* clause clearly is violated. The Constitution requires Florida to "keep its word" as expressed by its Legislature and do no less than what its law provided as presumptively relied on by its courts and by petitioner.

CONCLUSION

The petitioner is entitled to have his right to earn gain time calculated in accordance with Section 944.27, Florida Statutes (1975), as it was in effect on January 31, 1976, the date of the offense in question. The application of Section 944.275, Florida Statutes (1979) to petitioner should therefore be declared violative of the *ex post facto* clause. Accordingly, the judgment of the Supreme Court of Florida should be reversed with appropriate directions to enter an amended judgment.

Respectfully submitted,

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APPENDIX

EXHIBIT

Principal Florida Statutes and Session Laws

Section 944.27, Florida Statutes (1975)

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The [1][Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [2][department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s.944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Section 944.275, Florida Statutes (1979)

944.275 Gain-time.—

(1) The department shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a

satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to 1 day shall be determined by the department. The department may provide for the award of gain-time under this subsection on a fractional basis for less than 1 day's participation in work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctinal work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program, who demonstrates a constructive utilization of time, and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraph (b) and this paragraph during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, per-

sonal adjustment, and individual effort towards his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted on an individual basis from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life or assisting in recapturing an escaped inmate, or who is some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence, may be granted special gain-time on the basis of from 1 to 60 days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence; and the prisoner's gain-time, including any additional gain-time allowed under subsectrion (2) and extra gain-time allowed under subsection (3), shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided in this section.

Chapter 76-273, Section 1 Laws of Florida

Section 1. Section 944.27, Florida Statutes, is amended to read:

944.27 Gain-time for good conduct; sechedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time *on a monthly basis as earned* from the sentences of every prisoner who has committed no infraction of the rules or regulations of the department, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of *the* ~~his~~ sentence;

(b) Ten days per month off the third and fourth years of *the* ~~his~~ sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of *the* ~~his~~ sentence; and *the prisoner* ~~he~~ shall be entitled to credit for a month as soon as *the prisoner* ~~he~~ has served such time as, when added to the deduction allowable, would equal a month

(2) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein. No inmate shall receive additional gain-time allowances under this section solely by virtue of participation in academic classroom instruction.

(3) ~~(2)~~ When a prisoner is under two or more cumulative sentences, *the prisoner* ~~he~~ shall be allowed gain-time ~~as if they were all one sentence and his gain-time~~, including any extra gain-time allowed *the prisoner* ~~him~~ under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Chapter 77-174, Section 1
(portion amending Section 944.27, Florida Statutes (1975)) Laws of Florida

The State Attorney shall make the final determination as to whether the prosection shall continue.

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(2) When a prisoner is under two or more cumulative sentences, the prisoner shall be allowed gain-time *and his gain-time,* including any extra gain-time allowed the prisoner under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Note.—Insertion made to correct an apparent typographic error.

Chapter 78-304, Laws of Florida

Section 1. Section 944.275, Florida Statutes, is created to read:

944.275 Gain-time, additional gain-time for program participation; extra gain-time.—

(1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentences of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who

has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned a provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis as earned up to one day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to one day shall be determined by the depart-

ment. The department may provide for the award of gain-time under this subsection on a fractional basis for less than one day's participation work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctional work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline does not participate in correctional work program who demonstrates a constructive utilization of time; and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraphs (b) and (e) during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him and against whom no disciplinary report has been filed within the preceding six months, and whose conduct, personal adjustment and individual effort towards his own rehabilitation shows his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study, may be granted on an individual basis from one to six days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life, assisting in recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the the of his sentence may be granted special gain-time on the basis of from one to sixty days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence, and the prisoner's gain-time, including any additional gain-time allowed under subsection (2) and extra gain-time allowed under subsection (3) shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided for in this section.

Section 2. Section 944.27, Florida Statutes, as amended by chapters 76-273 and 77-174, Laws of Florida, and sections 944.271 and 944.29, Florida Statutes, as amended by chapter 77-120, Laws of Florida, are hereby repealed.

Section 3. Section 20 of chapter 76-273, Laws of Florida, is amended to read:

Section 20. This act shall take effect July 1, 1976 ~~except that section 19 shall take effect January 1, 1979.~~

Section 4. This act shall take effect July 1, 1978.

Approved by the Governor June 16, 1978.

Filed in Office Secretary of State June 16, 1978.